JUL 27 1945
CHARLES ELMORE CROPLEY

In the
Supreme Court of the United States
October Term, 1945

No. 269

MILTON ROE SABIN and BERTHA FLORENCE SABIN,
Petitioners,

VERSUS

HOME OWNERS' LOAN CORPORATION, a Corporation, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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July, 1945.

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In the
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No.

MILTON ROE SABIN and BERTHA FLORENCE SABIN,

Petitioners,

VERSUS

HOME OWNERS' LOAN CORPORATION, a Corporation; O. K. WETZEL; P. L. MURPHY; A. GARLAND MARRS, Sheriff of Tulsa County, Oklahoma; W. S. DUGGINS, NATE MARTIN, JOHN BURNETT and TOM KITHCART, Deputy Sheriffs of Tulsa County, Oklahoma; CAL CRUM, Clerk of the District Court of Tulsa County, Oklahoma; and JOE HODGES, doing business under the name and style of JOE HODGES TRANSFER AND STORAGE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

The petition of Milton Roe Sabin and Bertha Florence Sabin, petitioners, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved

January 10, 1938, judgment was entered in the District Court of Tulsa County, State of Oklahoma, in favor of the Home Owners' Loan Corporation and against petitioners, foreclosing a mortgage on petitioners' home (R. 130, 331).

Appeal from that judgment was perfected to the Supreme Court of the State of Oklahoma on August 8, 1938 [*Sabin* v. *Home Owners' Loan Corporation*, 187 Okla. 504, 105 Pac. (2d) 245].

Meantime, the judgment of foreclosure not having been superseded, and being unpaid, an order of sale was issued on July 18, 1938 (R. 132, 341).

Sale of petitioners' property having been had under that order of sale, and the Home Owners' Loan Corporation being the purchaser, the sale was confirmed by the District Court of Tulsa County, Oklahoma, on September 9, 1938 (R. 132, 349; Appendix I-III). This order of confirmation directed the Sheriff of Tulsa County, Oklahoma, to make and execute a deed to the purchaser, and that the clerk of said court issue a writ of assistance to the sheriff of said county directing him to put the purchaser in possession. These petitioners having given notice of appeal from said order of confirmation, the court extended the time for

making and serving case-made, and, in accordance with the provisions of the statute (Section 546, Okla. Stat. 1931, Appendix V), allowed these petitioners twenty days within which to file a supersedeas bond in the sum of $6,500.00.

On the same day, September 9, 1938, the sheriff executed and delivered to the Home Owners' Loan Corporation a deed to said property (R. 132, 351).

A new appeal was immediately perfected by petitioners to the Supreme Court of Oklahoma from the order of confirmation (*Sabin* v. *H. O. L. C., supra;* see also, R. 97, 158, 309); and, petitioners believing the amount of supersedeas bond fixed by the lower court in its order of confirmation to be excessive, asked the appellate court to fix the amount of such bond, and that Court, on September 26, 1938, entered an order staying execution in the lower court until further order of the appellate court (R. 136, 375).

Notwithstanding, the H. O. L. C. had a writ of assistance issued by the lower court on December 3, 1938, which was recalled on December 15, 1938, by order of its attorney (R. 176, 378).

After some controversy in the appellate court as to the amount of supersedeas bond, it was finally fixed at $2,000.00, and a bond was filed in that Court and approved, on February 27, 1939 (R. 132, 344).

An opinion was rendered by the Supreme Court of the State of Oklahoma on May 28, 1940 (*Sabin* v. *H. O. L. C., supra.*), and on June 13, 1941, a purported mandate from the Supreme Court of the State of Oklahoma (R. 132, 354),

undated and claimed to be otherwise defective, was filed in the District Court of Tulsa County, Oklahoma.

On July 21, 1941, the Home Owners' Loan Corporation filed in the District Court of Tulsa County, Oklahoma, an application for an alias writ of assistance (R. 239, 384), and thereupon a purported alias writ of assistance was issued by the clerk of said court (R. 157, 376).

On July 24, 1941, petitioners filed in the Supreme Court of the State of Oklahoma, with leave of that Court granted at a time when the Home Owners' Loan Corporation was represented by counsel there present (R. 147, 179, 180), a petition to recall mandate and grant a rehearing (R. 134, 356); notice of which was given to the sheriff of Tulsa County, Oklahoma, on July 25, 1941 (R. 149, 236, 379).

On July 26, 1941, the sheriff executed the writ of assistance (R. 157, 376) by removing all of petitioners' household furniture, personal effects, automobiles and other property, and placing the Home Owners' Loan Corporation in possession.

Petitioners' petition to recall mandate and grant a rehearing was not finally denied by the Supreme Court of the State of Oklahoma until September 5, 1941 (R. 288, 385), and a writ of *certiorari* was denied by this Court on February 5, 1942 (*Sabin* v. *H. O. L. C.*, Mem. 315 U. S. 800, 62 Sup. Ct. 625, 86 L. ed. 1201). No further proceedings have been had in the Supreme Court of the State of Oklahoma since that time, and no further mandate has issued from that

Court to the District Court of Tulsa County, Oklahoma (R. 135, 373).

This action was filed by petitioners on July 24, 1943, in the District Court of Tulsa County, Oklahoma, against all persons concerned in the execution of the alias writ of assistance and the eviction of petitioners from their home, to recover damages in excess of $400,000.00 for the alleged wrongful eviction of petitioners (R. 2-25).

The action was removed to the District Court of the United States for the Northern District of Oklahoma (R. 33), where it was tried on February 22, 1944 (R. 92), and at the close of the evidence of petitioners the case was dismissed by the Court as to the defendants Wetzel, Murphy and Crum (R. 253), and at the conclusion of all the evidence the court instructed the jury to return a verdict in favor of the Home Owners' Loan Corporation (R. 314), and submitted the case to the jury as to the other defendants only upon their acts in connection with an adjoining lot not here now involved.

B.

Basis of Jurisdiction of This Court

Petitioners appealed from the judgment of the District Court of the United States for the Northern District of Oklahoma to the Circuit Court of Appeals for the Tenth Circuit, and that Court rendered judgment affirming the District Court on February 21, 1945 (R. 407). The opinion of the Circuit Court of Appeals (R. 399) is reported in 147 Fed. (2d) 653.

Petition for rehearing was filed by petitioners (R. 408), and was denied by the Circuit Court on March 19, 1945 (R. 435).

On June 14, 1945, within the three months allowed by statute (Title 28, Section 350, U. S. C. A.) for filing petition of *certiorari* in this Court, Justice Rutledge of this Court extended the time for filing such petition until July 19, 1945, and before the expiration of that time and on July 13, 1945, Justice Black further extended the time therefor until July 28, 1945, and this petition is presented and filed within such extended time.

Jurisdiction is conferred upon this Court by Title 28, Section 347(a), U. S. C. A. (Jud. Code #240, as amended) to require by *certiorari* that said cause be certified to this Court by the Circuit Court of Appeals for the Tenth Circuit for determination by this Court.

C.

Questions Presented

1. Whether petitioners were denied due process of law by being evicted from their home under a writ of assistance issued to place in possession one claiming title under a sheriff's deed made and executed at a time when execution was stayed.

2. Whether petitioners were denied due process of law by being evicted from their home under a writ of assistance issued out of the District Court of Tulsa County, Oklahoma, at a time when the Supreme Court of the State of Oklahoma

had re-assumed and had sole jurisdiction of the case in which such writ of assistance was issued.

D.

Reasons Relied On for the Allowance of the Writ

The Circuit Court of Appeals held (R. 404) that further execution under the order confirming sale was stayed for a period of at least twenty days, as provided by the order (Appendix I-III), under the provisions of Title 12, Sec. 971, Okla. Stat. 1941 (Section 546, Okla. Stat. 1931, Appendix V); but at the same time held that the sheriff's deed executed and delivered during that twenty-day stay period was not thereby rendered void. This decision decides an important question of local law in a way probably in conflict with applicable local decisions, particularly the decision in *Goldstern* v. *Gavin*, 187 Okla. 338, 102 Pac. (2d) 582, in which case the principle was laid down that title to property remained in the defendant until confirmation of sale; also the decision in *Fariss* v. *Deming Investment Co.*, 5 Okla. 496, 50 Pac. 130, in which it was held that supersedeas cannot be ignored or an execution issued as long as it remains on record until its effect has been tested by direct attack; also the decision in *Brauns* v. *Donahoe*, 127 Okla. 33, 259 Pac. 541, which case holds that a supersedeas bond given to stay execution on an order confirming sale is for the purpose of covering damages, among other damages, caused by reason of delay in obtaining sheriff's deed. It likewise conflicts with the great weight of authority in a question of general law, particularly the decision in *Board of Regents* v. *Linscott*,

30 Kan. 241, 1 Pac. 81, 91, holding that a sheriff's deed is required to vest title, and *Anthony* v. *Janssen*, 183 Cal. 329, 191 Pac. 538, and *In re Worley*, 50 Fed. Supp. 611, which cases hold that a sheriff is without lawful power or authority to execute a deed at a time when an order of confirmation has been stayed. The decision therefore operates to sanction the deprivation of petitioners' property without due process of law.

The Circuit Court of Appeals held that by the Supreme Court of the State of Oklahoma granting leave to petitioners to file in that Court a petition to recall mandate and grant a rehearing, and considering such petition, jurisdiction of the case was not re-assumed by that Court so as to deprive the District Court of Tulsa County, Oklahoma, of jurisdiction to proceed with an execution in the case at the same time such petition was being considered in the appellate court (R. 405). This decision of the Circuit Court of Appeals is contrary to the decision of this Court in *Chicago G. W. R. Co.* v. *Basham*, 249 U. S. 164, 63 L. ed. 534, 39 Sup. Ct. Rep. 213, in which case this Court laid down the principle that while a judgment was being considered by a state court of last resort upon a petition for rehearing the litigation is not brought to a conclusion in that Court until such petition is disposed of by it. The decision is likewise in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Warren* v. *Terr. of Hawaii*, 119 Fed. (2d) 936, holding that the entertainment by a court of appeals having power to recall a mandate but not having recalled it, of

a petition for rehearing, amounts to a re-assumption of jurisdiction of the case by the appellate court. The decision likewise probably conflicts with the decision of the local court in *Ehrig* v. *Adams,* 67 Okla. 157, 169 Pac. 645, in which case the Supreme Court of Oklahoma recalled a mandate, granted a rehearing, and rendered an opinion directly contrary to its original opinion; and with the decision in *Egbert* v. *St. Louis & S. F. R. Co.,* 50 Okla. 623, 151 Pac. 228, holding that no two courts can have jurisdiction of the same cause of action at the same time. It likewise conflicts with the great weight of authority in a question of general law, particularly the cases cited in the *Egbert case, supra,* to the same effect as held in that case. The decision therefore operates to sanction the deprivation of petitioners' property without due process of law.

Prayer for Writ

Wherefore, your petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 3063, Milton Roe Sabin and Bertha Florence Sabin, Appellants, v. Home Owners' Loan Corporation, a corporation, O. K. Wetzel, P. L. Murphy, A. Garland Marrs, Sheriff of Tulsa County, Oklahoma, W. S. Duggins, Nate Martin, John Burnett and

Tom Kithcart, Deputy Sheriffs of Tulsa County, Oklahoma, Cal Crum, Clerk of the District Court of Tulsa County, Oklahoma, and Joe Hodges, doing business under the name and style of Joe Hodges Transfer and Storage, Appellees;" and that said judgment of the United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

MILTON ROE SABIN and
BERTHA FLORENCE SABIN,
Petitioners.

HERBERT K. HYDE,
Attorney for Petitioners.

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HOME OWNERS' LOAN CORPORATION, a Corporation; O. K. WETZEL; P. L. MURPHY; A. GARLAND MARRS, Sheriff of Tulsa County, Oklahoma; W. S. DUGGINS, NATE MARTIN, JOHN BURNETT and TOM KITHCART, Deputy Sheriffs of Tulsa County, Oklahoma; CAL CRUM, Clerk of the District Court of Tulsa County, Oklahoma; and JOE HODGES, doing business under the name and style of JOE HODGES TRANSFER AND STORAGE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS

The opinion of the Supreme Court of the State of Oklahoma in the foreclosure case leading up to this case (by

Justice Riley, concurred in by Justices Bayless, Osborn, Hurst and Davison) is reported in 187 Okla. 504, 105 Pac. (2d) 245.

No opinion was rendered by the United States District Court.

The opinion of the Circuit Court of Appeals for the Tenth Circuit (Circuit Judges Phillips, Bratton, and Murrah, written by Judge Bratton) was rendered February 21, 1945, and is found at Page 399 of the record, and is reported in 147 Fed. (2d) 653.

JURISDICTION

Jurisdiction of this Court to grant *certiorari* is invoked under Title 28, Section 347(a), U. S. C. A. (Jud. Code #240, as amended), and is shown in the petition at page 6.

STATEMENT OF THE CASE

The facts have also been sufficiently set out in the petition at page 2. Particular attention is called to the fact that the sheriff's deed (R. 132, 351), was executed and delivered at a time when execution was stayed by order of the Court (R. 132, 349, Appendix I); also, to the fact that the alias writ of assistance (R. 157, 376) was executed at a time when the Supreme Court of Oklahoma had permitted to be filed and had under consideration a petition to recall mandate and grant a rehearing (R. 134, 356).

SPECIFICATION OF ERRORS

I.

The sheriff's deed was and is void, because issued at a time when execution was stayed, and the Circuit Court of Appeals was in error in failing to hold that petitioners have been denied due process of law by having been evicted under an alias writ of assistance issued to put the H. O. L. C. in possession under such void sheriff's deed.

II.

The alias writ of assistance is further void because it was executed at a time when the Supreme Court of Oklahoma had re-assumed and had exclusive jurisdiction of the case, and the Circuit Court of Appeals was in error in failing to hold that petitioners have been denied due process of law by being evicted under such writ.

ARGUMENT

I.

The Sheriff's Deed Was Void

The applicable statutes of the State of Oklahoma at the time of the foreclosure proceedings, sale and the issuance of the sheriff's deed, were the Oklahoma Statutes of 1931.

Section 456 of these statutes (Appendix III) provides that, among other necessary steps in the enforcement of a judgment by "execution," there must be a confirmation of the sale by the court.

This required order of confirmation is an appealable order, i. e., a final judgment from which an appeal may be taken.

—*Vann* v. *Union Central Life Ins. Co.*, 79 Okla. 17, 191 Pac. 175;
Morrison v. *Burnett*, 154 Fed. 617;
Dakota Investment Co. v. *Sullivan*, 9 N. D. 303, 81 Am. St. Rep. 584;
Wauchope v. *McCirmick*, 158 Mo. 660, 59 S. W. 970;
State Nat. Bank v. *Neel* (Ark), 122 Am. St. Rep. 185;
Hammond v. *Cailleand*, 111 Cal. 206, 52 Am. St. Rep. 167;
Koehler v. *Ball*, 2 Kan. 160, 83 Am. Dec. 451.

Quoting from *Vann* v. *Union Central Life Ins. Co.*, *supra*, it is therein said:

"* * * an appeal may be prosecuted from the order of confirmation."

In the same section of the statute providing for confirmation of the sale (Okla. Stat. 1931, Section 456, *supra*), it is further provided that upon such confirmation being made there shall be "an order that the officer make to the purchaser a deed."

Section 457, Okla. Stat. 1931 (Appendix III), provides for the necessary recitals of the sheriff's deed, and that it "shall be sufficient evidence of the legality of such sale."

Section 424, *id.*, provides that:

"* * * The court may, in the order confirming a sale of land under order of sale on foreclosure or upon execution, award or order the issuance of a writ of assistance by the clerk of the court to the sheriff * * * to place the purchaser in full possession of such land. * * *"

Section 546, *id.* (Appendix V) provides that at any time when the time for making or completing a case-made for appeal is extended the court or judge "*shall* include in such order an order *staying execution* pending the giving of an undertaking."

All of these things were included in the order of confirmation of sale in this case (Appendix I-III), i.e., (1) the sale was confirmed; (2) the sheriff was directed to make a deed; (3) a writ of assistance was ordered to put the purchaser in possession; (4) notice of appeal was given; (5) the petitioners were given an extension of time to make and serve case-made; and (6) petitioners were given twenty days to file a supersedeas bond.

While the order of confirmation did not specifically order that the execution be stayed during the twenty days allowed to file supersedeas bond, we argued to the Circuit Court of Appeals, and that Court stated in its opinion (R. 404), "with that we are not in disagreement," that the stay was granted even without being in the order by reason of the mandatory requirements of Okla. Stat. 1931, Section 546 (12 Okla. Stat. 1941, Section 971) that whenever the time for making case-made is extended the court *shall* include in such order "staying execution pending the giving of an undertaking," and by reason of the fact that the court did, in fact, allow twenty days to file supersedeas bond.

This section of the statute was construed in *Howe* v. *Farmers & Merchants Bank*, 155 Okla. 284, 8 Pac. (2d) 665, the Court saying:

"* * * In 1905 it was provided that in extending the time for settling and signing of a case-made, the trial court should fix the time within which an undertaking might be given *to become immediately operative and effect a stay* pending the perfecting of the appeal."

The Circuit Court of Appeals states in its opinion (R. 404):

"* * * But no bond was ever given to supersede the order of confirmation. The extended time for the making and completing of the case-made has long since expired. And we understand that no appeal from the order was ever perfected. The contention that the deed is presently void because at the time of its execution and delivery an order was in force and effect staying execution of the judgment is without merit."

Both of the conclusions of fact upon which this conclusion of law is apparently based, are incorrect; for, as a matter of fact, a bond was given to supersede the order of confirmation, and an appeal was perfected from that order.

While the opinion by the Supreme Court of Oklahoma in *Sabin* v. *Home Owners' Loan Corporation, supra*, does not directly say that an appeal from the order of confirmation was perfected, but it is to be noted that in the opinion the Court says:

"* * * After exhaustive hearings the trial court confirmed the sale September 9, 1938. Defendants gave notice of appeal therefrom.

"In the meantime, August 8, 1938, defendants filed an appeal from the judgment of foreclosure.

"In their second proposition for reversal defendants urge the sale was premature because six months had not elapsed since the motion for a new trial was overruled, and that the sale price was grossly inadequate."

And both of these questions were considered and passed on by the Court in its opinion. It is at once apparent that, since the appeal from the original judgment of foreclosure was filed on August 8, 1938, there would have had to be another appeal perfected from the order confirming sale, which was on September 9, 1938, in order for the Court to know that the sale had been confirmed and to pass upon the questions presented upon the confirmation. It has never been contended otherwise by any of the parties. Thus, Mr. Walsh, counsel for the H. O. L. C., stated (R. 97) during the trial, that:

> "* * * The appeal taken to the Supreme Court of Oklahoma was after the sale was made and confirmed."

And Mr. Hudson, counsel for the members of the sheriff's office, stated (R. 158):

> "* * * This appeal was from an order confirming this sale, for which the bond was executed.
>
> THE COURT: Well, there were two appeals.
>
> MR. HUDSON: That's right.
>
> THE COURT: An appeal from the judgment, and later an appeal from the order confirming the sale."

The record also shows conclusively that a bond was eventually given to supersede the order (judgment) of confirmation; not, it is true, for $6,500.00 and not within the twenty days allowed, but within the extended time allowed by the Supreme Court of Oklahoma and in the sum of $2,000.00 as fixed by that Court.

On September 26, 1938, the Supreme Court of Oklahoma made an order (R. 136, 375) that:

> "* * * execution and all further proceedings * * * in the District Court of Tulsa County, Oklahoma, be stayed until further order of this Court."

And, on February 27, 1939, there was filed in and approved by the Clerk of the Supreme Court of Oklahoma, a supersedeas bond in the amount of $2,000.00 (R. 132, 344), which bond was conditioned that:

> "* * * if the judgment be affirmed, they will pay the value of the use and occupation of the property from the date of this obligation until the delivery of possession thereof * * *"

in accordance with the provisions of Section 543, Okla. Stat. 1931 (Appendix IV), providing that when the final order directs the delivery of possession of real property an undertaking to stay execution must be so conditioned.

It is held in *Local Bldg. & Loan Ass'n* v. *Hall*, 145 Okla. 206, 292 Pac. 68, that these are the conditions necessary to be in a supersedeas bond given in an appeal from an order of confirmation of sale of real estate in a mortgage foreclosure proceeding.

We submit, therefore, that, contrary to the conclusion of the Circuit Court of Appeals as to the facts, there was from September 9, 1938, until September 29, 1938, an effective stay by reason of the order contained in the order of confirmation by the District Court of Tulsa County; that from September 26, 1938, such stay was continued in effect by order of the Supreme Court of Oklahoma until February 27, 1939; and that from February 27, 1939, such stay was in effect by reason of the filing and approval of the supersedeas bond, within the time allowed, as extended.

These facts being true, it is submitted that no valid sheriff's deed could have been executed and delivered on the same day as the order of confirmation, September 9, 1938.

The statute (Okla. Stat. 1931, Section 456, *supra*) requires confirmation before a deed may issue. The issuance of the deed is the final step in the execution of the "execution" (or order of sale). But, further execution had been stayed, and was eventually superseded. In other words, the sheriff had proceeded to make a levy under the execution in his hands; he had given notice of sale, and sold the property, and the sale was confirmed. We do not contend that the stay or the supersedeas would undo that which was already done; but that its object and effect were to stay future proceedings.

—*Dulin* v. *Pacific Wood & Coal Co.*, 98 Cal. 306, 33 Pac. 123;
Hey v. *Harding* (Ky.), 78 S. W. 136;
Gardner v. *Continental Ins. Co.* (Ky.), 101 S. W. 911, 912;
Runyon v. *Bennett*, 34 Ky. (4 Dana) 598, 29 Am. Dec. 431.

The execution and delivery of the sheriff's deed (and, if necessary, a writ of assistance) were the only steps left to be taken following the order of confirmation; they were the only things to be done which there would be any object in staying or superseding—for it is the deed which vests the legal title in the purchaser, and once the purchaser obtains a valid legal title he would become immediately entitled also to possession.

What, then, is the effect of this sheriff's deed issued in violation of the stay and supersedeas?

The Statutes of Oklahoma providing for a sheriff's deed (Okla. Stat. 1931, Sections 456, 457, *supra*) were adopted at Statehood from the Statutes of Kansas, Sections 4556, 4557, then in effect, as is shown by the history in the Statutes of 1931; and with them were adopted the interpretation of those statutes as theretofore made by the Supreme Court of Kansas.

—*Harness* v. *Myers*, 143 Okla. 147, 288 Pac. 285;
Thompson v. *Smith*, 102 Okla. 150, 227 Pac. 77;
Byrd v. *State*, 99 Okla. 165, 226 Pac. 362;
Henrietta Min., etc., Co. v. *Gardner*, 19 Sup. Ct. 327, 173 U. S. 123, 43 L. ed. 637;
Willis v. *Eastern Trust, etc., Co.*, 18 Sup. Ct. 347, 169 U. S. 295, 42 L. ed. 752;
Whitney v. *Fox*, 17 Sup. Ct. 713, 166 U. S. 637, 41 L. ed. 1145.

It was held by the Supreme Court of Kansas, on July 5, 1883, prior to the adoption of the above mentioned statutes by Oklahoma from Kansas, in *Board of Regents* v. *Linscott*, 30 Kan. 240, 1 Pac. 81, 91, that a sheriff's deed is required in order to vest title to property sold at sheriff's sale on execution.

In *Goldstern* v. *Gavin*, 187 Okla. 338, 102 Pac. (2d) 582, it was held that:

> "When, in the execution case, the court set aside the sale and denied confirmation, title to the property remained in the defendant in that case."

Such is the general law.

In *Ford* v. *Nokomis State Bank*, 135 Wash. 37, 237 Pac. 314, it is held:

"In this state we have consistently held from *Singly* v. *Warren,* 18 Wash. 434, 51 Pac. 1066, 63 Am. St. Rep. 896, to *Cockran* v. *Cockran,* 114 Wash. 499, 195 Pac. 224, 198 Pac. 270, that a certificate of sale executed by a sheriff does not vest title; * * * a purchaser at a judicial sale * * * cannot be said to hold the title, unless he holds a deed in pursuance of the sale."

To the same effect: *Gray* v. *C. A. Harris & Son,* 200 Wash. 181, 93 Pac. (2d) 385.

And, in *Clark* v. *Strohbeen,* 190 Iowa 989, 181 N. W. 430, 13 A. L. R. 1419:

"A judgment debtor is not divested of title until after the expiration of the time for redemption and not until title is vested in the purchaser by sheriff's deed."

In *Anthony* v. *Janssen,* 183 Cal. 329, 191 Pac. 538, it is said:

"With respect to the sheriff's deed, it is sufficient to say, in anticipation of a new trial, that the sheriff was without lawful power at that time to execute a conveyance of the property. * * * The sheriff's power to convey did not accrue until there had been a failure to redeem within the time fixed. * * * The direction in the decree that the deed should be made immediately after the sale was contrary to the Code, and beyond the power of the court. It was therefore *void.*"

To the same effect:

—*Hall* v. *Yoell,* 45 Cal. 584;
Moore v. *Martin,* 38 Cal. 428;
Bernal v. *Bleim,* 33 Cal. 668;
Gross v. *Fowler,* 21 Cal. 392;
Conner v. *Long,* 63 Iowa 295, 19 N. W. 221;
Gorham v. *Wing,* 10 Mich. 486.

In *In re Worley,* 50 Fed. Supp 611 (D. C. Nebr.), it is said, pp. 612-613:

"But this court's inquiry must be directed to the debtor's rights in, and relation to, the farm on the day when she instituted this action. And upon these elements certain decisions of the Supreme Court of Nebraska are instructive. They have to do with the effect of supersedeas, the persistence of the right to redeem, and the status of the title to and the right of possession of foreclosed Nebraska real estate prior to the execution of sheriff's deed.

"In a leading case it was held in 1879 that 'where a proper supersedeas bond is filed and approved' after an order of confirmation of sheriff's sale in foreclosure in which a judgment for deficiency is awarded, 'no execution can issue on the judgment until the bond is set aside, modified, or appellant fails to perfect his appeal.' The suspension for every purpose of the decree of confirmation was asserted. (Citing cases.) Therefore, the filing and approval of the debtor's supersedeas bond in the foreclosure action in the state court effectively intercepted the execution of a sheriff's deed to the purchasing secured creditor until the lapse of the statutory period for the lodging of the appeal in the Supreme Court of the state."

See, also:

—*Philadelphia Mtg. & Tr. Co.* v. *Gustus*, 55 Nebr. 435;
Westerfield v. *South Omaha Loan & Bldg. Co.*, 80 Nebr. 806, 115 N. W. 305;
McCourt v. *Singers-Bigger*, 159 Fed. 102;
Draper v. *Davis*, 102 U. S. (12 Otto) 370, 26 L. ed. 121.

And, as further illustrating the contention that it is the law of Oklahoma that a valid sheriff's deed cannot issue pending appeal from an order confirming sale, is the applicable language in *Brauns* v. *Donahoe*, 127 Okla. 33, 259 Pac. 541, 542:

"It will be observed that this appeal is not from the personal judgment rendered against the defendant below, plaintiff in error here, but is only from the order and judgment of the court confirming sheriff's sale of land; that the supersedeas bond is given to stay the judgment confirming the sale and is conditioned to pay any damages and costs assessed against appellant by virtue of her appeal. The plaintiff, defendant in error, would be entitled to recover on the bond only such damages as he may have suffered *by reason of delay in obtaining sheriff's deed* and stay of judgment confirming sale, including costs of appeal, * * *."

And in *Johnston* v. *Johnston,* 104 Okla. 131, 230 Pac. 700, plaintiff was in possession prior to and at the time judgment was rendered against her in favor of the defendant, and was still in possession at the time her supersedeas bond was executed and approved for the appeal from the judgment. After the appeal was perfected, including the supersedeas bond, defendant obtained an order from the district court rescinding its order placing plaintiff in possession, declaring the stay bond insufficient, and ordering a writ of possession in favor of defendant. The Court says:

"The plaintiff contends that the order of the district court, April 8, 1918, was a *void* order and not competent, and we think this contention must be sustained. Section 794, C. S. 1921; *In re Epley,* 10 Okla. 631, 64 Pac. 18; *Egbert* v. *Ry. Co.,* 50 Okla. 623, 151 Pac. 228; *Short* v. *Chaney,* 66 Okla. 258, 168 Pac. 425.

"Defendant says this order was not subject to objection on collateral attack, but this Court thinks that, since it was a void order and made without jurisdiction, it was subject to attack in any proceeding. *Lee* v. *Tonsor et al.,* 62 Okla. 14, 161 Pac. 804; *Roth et al.* v. *Union Nat'l Bank of Bartlesville et al.,* 58 Okla. 604, 160 Pac. 505; *Choi* v. *Turk,* 55 Okla. 499, 154 Pac. 1000.

"The defendant was allowed to introduce it, but it is not available as a defense, because there is no authority for it, and it is against both the letter and the spirit of the provisions for appeals.

"* * * The judgment of the court as affirmed in Case No. 10125, *Virginia Johnson* v. *E. B. Johnston et al.*, 82 Okla. 259, 200 Pac. 204, held that the defendant, E. B. Johnston, was the owner and entitled to the possession of the premises, but in the appeal by virtue of the supersedeas bond the plaintiff, Virginia Johnson, had the right to the possession until the appeal was passed on and mandate filed in the trial court."

And in *Frensley* v. *Frensley*, 173 Okla. 321, 49 Pac. (2d) 731, it is said:

"Upon an appeal which stays proceedings, the subject-matter involved is removed from the jurisdiction of the lower court until the appeal has been determined."

The Supreme Court of Oklahoma did eventually hand down its decision that the order confirming sale here involved was correct and should be affirmed; but, until that time that it was "passed on by the Supreme Court and mandate filed" petitioners, under the order of court staying further execution and granting supersedeas, were entitled to retain the legal title to their home, and the sheriff was without power or authority to execute and deliver the deed, and the deed was therefore void and conveyed no title whatsoever. Being invalid when issued, it is not made valid by any subsequent affirmance of the order of confirmation.

No other deed has ever been issued. It was under that void deed that the officers acted in executing the writ of assistance. Petitioners therefore, even until now, still own

the legal title to said property, and have been at all times entitled to remain in possession thereof until such time, if ever, as a valid sheriff's deed is executed and delivered.

Thus petitioners have been deprived of their property without due process of law.

II.

The Writ of Assistance Was Void Because Issued By a Court Without Jurisdiction

In *Egbert* v. *St. Louis & S. F. R. Co.*, 50 Okla. 623, 151 Pac. 228, the Court held:

> "A 'mandate' is the official mode of communicating the judgment of the appellate court to the lower court.
>
> "If, before a mandate of the Supreme Court has regularly reached the trial court and been spread upon its record, the trial court makes an order allowing the petition to be amended, and the amendment is made accordingly, the order of the trial court and the amendment are null and void, and the petition stands as if no amendment had been made thereto, although the cause in the Supreme Court has been decided, and written opinion filed, prior to the time of making such order and amendment."

To the same effect:

—*Dooley* v. *Foreman*, 94 Okla. 166, 221 Pac. 47;
Board of Com'rs v. *Baxter*, 113 Okla. 280, 241 Pac. 752;
American Inv. Co. v. *Wadlington*, 122 Okla. 56, 250 Pac. 802.

And it is further held in the *Egbert case, supra*, that:

> "It is a general proposition of law that no two courts have jurisdiction of the same cause of action at the same time."

On June 13, 1941, a purported mandate from the Supreme Court of Oklahoma (R. 132, 354) issued in the name of Wayne W. Bayless, Chief Justice, whereas Earl Welch was Chief Justice beginning January 13, 1941, to January 11, 1943 (R. 133, 355), and which mandate bore date of "this 12th day of *June* ——" without giving any year, was filed in the District Court of Tulsa County, Oklahoma. On July 21, 1941, the alias writ of assistance upon which petitioners were dispossessed was issued by the Clerk of the District Court of Tulsa County (R. 157, 376).

On July 24, 1941, prior to any execution on the writ of assistance, petitioners filed in the Supreme Court of the State of Oklahoma, their Petition to Recall Mandate and Grant a Rehearing (R. 134, 356). This was filed with leave of that Court endorsed thereon (R. 356): "Leave granted to file this 24th day of July, 1941. Fletcher Riley, Acting Chief Justice."

Mrs. Bertha Florence Sabin, one of the petitioners, testified (R. 147, 179, 180) that at the time leave was granted to file the petition just referred to, Mr. O. K. Wetzel, an attorney and one of the respondents herein, was present representing the H. O. L. C. Mrs. Sabin further offered to testify (R. 236) that on July 25, 1941, she served on A. Garland Marrs, Sheriff of Tulsa County, a written notice (R. 236, 379) notifying him of the filing of said petition to recall mandate and for rehearing in the Supreme Court with leave of that Court and that the purported writ of assistance held by him was thereby vitiated; and a copy

of the notice, with affidavit of service attached, was offered in evidence (R. 236) and refused. It is claimed by the sheriff and his deputies that they are protected by the writ, whether void or not. We do not here care to go into that issue, since the writ was issued upon the written application of the H. O. L. C. (R. 239, 384), signed by its attorney, by the same O. K. Wetzel who was present in person when leave was granted by the Supreme Court of Oklahoma to file the petition mentioned. Certainly, therefore, the H. O. L. C. is charged with knowledge that they had no right to thereafter proceed to enforce such writ, if such be the law as we shall endeavor now to show.

Can two courts have jurisdiction of the same cause at the same time? In *Egbert* v. *St. Louis & S. F. R. Co., supra,* it is held they cannot. And such is the general rule of law:

—*Ott* v. *Boring,* 131 Wis. 472, 110 N. W. 825, 111 N. W. 833, 11 Ann. Cas. 857;

Thomas v. *Thomas,* 27 Okla. 801, 109 Pac. 825, 113 Pac. 1058;

Western Wheel-Scraper Co. v. *Drinnen* (D. C. Ill.), 79 Fed. 820;

Blake v. *Miller,* 118 Ill. 500, 8 N. E. 828;

Ladd et al. v. *Couzins,* 35 Mo. 513;

Baggs v. *Smith,* 53 Cal. 88;

Shay v. *Chicago Clock Co.,* 111 Cal. 549, 44 Pac. 237;

Baker v. *Borello,* 131 Cal. 615, 63 Pac. 914;

In re Bullard's Estate, 3 Cal. Unrep. 688, 31 Pac. 1119;

Keyser v. *Farr,* 105 U. S. 265, 26 L. ed. 1025.

The Supreme Court of Oklahoma has held that it has the *power*, even after term, to recall a mandate and grant a rehearing:

—*Brann* v. *Harris*, 173 Okla. 167, 47 Pac. (2d) 876;
Simmons v. *Harris*, 108 Okla. 189, 235 Pac. 508;
Henderson v. *Pebworth*, 107 Okla. 238, 232 Pac. 74;
Thompson v. *Nickle*, 113 Okla. 44, 239 Pac. 649;
McKee v. *Thornton*, 81 Okla. 261, 198 Pac. 303;
St. Paul Fire & Marine Ins. Co. v. *Peck*, 40 Okla. 396, 139 Pac. 117.

And while it says in several cases that this ordinarily will not be done in the absence of fraud, accident, or inadvertance, it did, in at least one case, recall a mandate, grant a rehearing, and render an opinion directly contrary to its original opinion because the Court itself had based its first opinion upon a misapprehension of the law. This was in *Ehrig* v. *Adams*, 67 Okla. 157, 169 Pac. 645, wherein the Court says:

> "Our attention has not been called to any limitation in the Constitution or statutes of this State upon the power of this Court to recall its mandate.
>
> "In the case of *Thomsen et al.* v. *Cayser et al.*, 243 U. S. 66, 37 Sup. Ct. 353, 61 L. ed. 597, Ann. Cas. 1917D, 322, in an opinion filed March 6, 1917, the Supreme Court of the United States in overruling a motion to dismiss, based upon the action of the Circuit Court of Appeals in recalling its mandate after judgment had been entered in the lower court and the term had expired, said:
>
> " 'A writ of error from the federal Supreme Court to review a judgment of reversal with instructions to dismiss the complaint which a Circuit Court of Appeals had entered on rehearing after it had recalled its mandate, previously issued, ordering a new trial, and had set aside the judgment of the court below,

need not be dismissed, either because the trial court had theretofore entered judgment on the original mandate, and had adjourned for the term without any application made to recall such judgment, or any writ of error to review such judgment sought.'

"To the same effect is the case of *Franklin Bank Note Co.* v. *Mackey*, 158 N. Y. 683, 51 N. E. 178, where a motion was made to vacate an order recalling the mandate after the same had been filed and judgment entered thereon in the lower court. In that case the Court of Appeals said:

" 'It is often erroneously assumed that after the filing of the remittitur in the court below, and order entered thereon, this court is deprived of all jurisdiction in the cause. In *Sweet* v. *Mowry*, 138 N. Y. 650, 34 N. E. 388, a motion for reargument was granted and a return of the remittitur requested. These acts of the court were held to be a resumption of jurisdiction. * * * It is competent for this court to determine whether it will resume jurisdiction for any purpose, and, having decided to do so, it then requests the court below to return the remittitur.' "

It is true in this case the Supreme Court of Oklahoma did not ever order the mandate recalled, but they did, as stated, grant leave to petitioners to file a petition in that Court to recall the mandate and to grant a rehearing; and the Supreme Court did consider that petition, and did not pass on the question of whether it would be granted until September 5, 1941 (R. 288, 385).

In the meantime, after that petition was filed, but before it was passed on, the writ of assistance was executed in the lower court.

On September 5, 1941, the petition was denied by the Supreme Court. But what if it had been allowed, and the

mandate then been ordered recalled? We have shown that the Court had power to do that. The lower Court would then have had to back up, recall its writ of assistance, put petitioners back into possession of their property, and put the matter back in *statu quo* as it was on July 24, 1941; else any subsequent action of the Supreme Court could not be effective. This is one of the reasons no two courts can have jurisdiction of the same cause at the same time.

As to the effect of the Supreme Court of Oklahoma granting permission to petitioners to file the petition mentioned, we find it held by this Court, in *Chicago G. W. R. Co.* v. *Basham*, 249 U. S. 164, 63 L. ed. 534, 39 Sup. Ct. 213, that:

> "• • • whatever its form of finality, if a judgment be in fact *subject to reconsideration* and review by the state court of last resort through the medium of a petition for rehearing, and such petition is presented to and *entertained and considered* by that court, we must take it that, by the practice prevailing in the state, the litigation is not *brought to a conclusion* until this petition is disposed of, and until then the judgment previously rendered cannot be regarded as a final judgment within the meaning of the Act of Congress. We said recently in an analogous case: 'If it were not so, a judgment of state court, susceptible of being reviewed by this court, would, notwithstanding that duty, be open at the same time to the power of a state court to review and reverse.' *Andrews* v. *Virginian R. Co.*, decided January 7, 1919 (248 U. S. 272, ante 236, 39 Sup. Ct. Rep. 101)."

This case was followed by the Circuit Court of Appeals for the Ninth Circuit, in *Warren* v. *Terr. of Hawaii*, 119 Fed. (2d) 936, wherein it is said:

"Appellee contends the appeal was taken too late and that we have no jurisdiction to consider it. The appeal here was not taken within the three months from the entry of the Hawaiian Supreme Court's judgment. There was a petition before that Court filed within the time under a Court rule giving an unconditional right to file it within 20 days after the filing of the Court's opinion. There was also a Court rule requiring the issue of the mandate forthwith on the decision of a criminal case. The mandate was issued before the petition was filed. The Court had the power to recall it, on its own motion or that of the losing party. *It was not recalled.* The Court in dismissing the petition stated, 'Although without jurisdiction to pass upon the merits of the motion for rehearing, we have carefully examined it and entertain no doubt that were it properly before us for consideration we would be compelled to deny the petition for lack of merit.' * * * Since the Court had *power* to recall the mandate, we regard its admitted consideration of the merits an *entertainment* within the rules of *Chicago, Great Western Ry. Co.* v. *Basham*, 249 U. S. 164 (and other cases cited), and hence have given the merits the above consideration."

This last case presents almost the same situation as this case: The Supreme Court of Oklahoma had the power to recall its mandate; it did not recall it; but it did entertain a petition for rehearing. We submit that this amounted to such a re-assumption of jurisdiction of the case as to deprive the lower court and its officers to act further while it was thus being considered and entertained by the appellate court.

The Circuit Court of Appeals in this case, while recognizing the power of the Supreme Court of Oklahoma to recall its mandate here involved, refused to follow the decision of this Court in the *Chicago, G. W. R. Co. case, supra*, and its

decision is in direct conflict with the decision of the Ninth Circuit in the *Warren case, supra,* and although its attention was called to both these cases in the briefs, no mention is made of them in its opinion, the Court being content with merely saying that "The granting of leave to file the petition did not effectuate a re-assumption of jurisdiction of the cause" (R. 405), without citing any authority for this conclusion.

Attention is called to the fact that petitioners here filed a petition for *certiorari* in this Court to be directed to the Supreme Court of Oklahoma following the denial of the aforesaid petition to recall mandate and grant a rehearing, in Case No. 767, October Term, 1940. This they had a right to do, as is stated in *Brann* v. *Harris, supra,* and, as is further stated in that case:

> "The trial court had no right to proceed as if the case were closed while it was still pending in this Court and in the Supreme Court of the United States.
>
> "If the trial court in thereafter proceeding was in the position of passing upon the right of this Court to recall the mandate, that matter could not be properly considered or passed upon by the trial court. *Stanley, County Treasurer* v. *School District No. 4 of Marshall County,* 142 Okla. 240, 286 Pac. 340."

We submit that the writ of assistance became vitiated by the act of the Supreme Court in re-assuming jurisdiction of the case, and that the H. O. L. C. could not lawfully permit the sheriff to proceed thereunder until after the Supreme Court of Oklahoma had passed upon the petition to recall mandate, and, after that, not until this Court had passed

upon the petition for writ of *certiorari* on February 2, 1942. (*Sabin* v. *H. O. L. C.*, No. 786, Mem. 315 U. S. 800, 62 Sup. Ct. 625, 86 L. ed. 1201.)

Furthermore, following the filing of the order of this Court denying *certiorari* in the Supreme Court of Oklahoma, it is shown by the exhibit of a copy of the docket of that Court (R. 135, 373) that no further action has ever been taken by that Court to again transfer jurisdiction of the matter to the State District Court. We submit, therefore, that jurisdiction of the case still rests at this time in the Supreme Court of Oklahoma.

CONCLUSION

In conclusion, your petitioners respectfully submit that the final determination by this Court of the questions of law involved in this case is of the utmost importance to the rights of the innumerable persons against whom mortgages are being foreclosed every day; that the decision of the Circuit Court of Appeals herein is not only contrary to the law, as announced by this Court in its earlier decisions, but is contrary to the law announced by other Circuit Courts as well as probably contrary to the decisions of the local State courts of Oklahoma; and unless the errors in that decision are corrected by this Court, the effect will be to create regrettable confusion regarding questions of law which are of the utmost importance in every mortgage foreclosure case, which cases are large in number and involve

large amounts of money. And it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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Oklahoma City, Oklahoma,
Attorney for Petitioners.

LEE WILLIAMS,
406 Perrine Building,
Oklahoma City, Oklahoma,
Of Counsel.

July, 1945.

APPENDIX

Record, Page 349:

ORDER APPROVING SHERIFF'S SALE OF REAL ESTATE

Now, on this 9th day of September, 1938, the same being a regular judicial day of the court, comes on for hearing the motion of plaintiff to confirm the sale of real estate made by the Sheriff of this County and State on the 19th day of August, 1938, under an Order of Sale issued out of the office of the Clerk of this Court, said sale being of the following described real estate, to-wit:

> Lot Sixteen (16), in Block Six (6), Sunset Terrace, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof,

and the objection of defendants, Bertha Florence Sabin, and M. R. Sabin, appearing by his attorney, Bertha Florence Sabin, and the defendant, Bertha Florence Sabin, appearing in person and by her own attorney, and both sides having announced ready, the matter having been fully presented and the Court being fully advised in the premises, finds that the objection to the confirmation of said sale should be overruled, and the Court having examined the proceedings of said Sheriff under said sale, including his return thereof, FINDS, that the same are regular and have in all things been performed in conformity with law and the orders of this Court, and the Clerk is directed to make an entry on

the Journal that the Court is satisfied of the legality of said sale.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that the objections to the confirmation of said sale herein be, and the same are hereby overruled, to which the defendants, Bertha Florence Sabin and M. R. Sabin, and each of them, except, and said exceptions are hereby allowed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, by the Court, that said sale, and all of the proceedings herein be, and the same are in all respects confirmed and approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, by the Court, that the Sheriff of this County be, AND HE HEREBY IS, directed to make and execute to the purchaser at said sale a good and sufficient deed for the premises so sold, and that a Writ of Assistance issue out of the Office of the Clerk of this Court to the Sheriff of said County, directing him to put the purchaser in possession of the said premises, and each and every part thereof.

To all of which the defendants, Bertha Florence Sabin and M. R. Sabin, and each of them except, and give notice in open Court of their intention to appeal to the Supreme Court of the State of Oklahoma.

IT IS THEREFORE ORDERED, that said defendants be, and they are hereby given thirty (30) days from date within which to prepare and serve case-made upon the plaintiff, herein, said plaintiff be given ten (10) days thereafter to suggest amendments, same to be settled and signed upon five (5) days notice.

IT IS FURTHER ORDERED, that said defendants are given twenty (20) days from date within which to file a supersedeas bond herein, in the sum of SIXTY-FIVE HUNDRED ($6,500.00) Dollars.

(Signed) PRENTISS E. ROWE,
Judge.

FILED: In District Court of Tulsa County, Oklahoma, September 16, 1938.

OKLAHOMA STATUTES, 1931:

456. CONFIRMATION OF SALE—PAYMENT OF MONEY TO PERSON ENTITLED.

If the court, upon the return of any writ of execution, for the satisfaction of which any lands or tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has, in all respects, been made in conformity to the provisions of this article, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed for such lands and tenements; and the officer, on making such sale, may retain the purchase money in his hands until the court shall have examined his proceedings as aforesaid, when he shall pay the same to the person entitled thereto, agreeably to the order of the court.

457. SHERIFF'S DEED—TITLE VESTED IN PURCHASER—NECESSARY RECITALS.

The sheriff or other officer who upon such writ or writs of execution, shall sell the said lands and tenements, or any

part thereof, shall make to the purchaser as good and sufficient deed of conveyance of the land sold, as the person or persons against whom such writ or writs of execution were issued could have made of the same, at or any time after they became liable to the judgment. The deed shall be sufficient evidence of the legality of such sale, and the proceedings therein, until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned, as was vested in the party at, or after, the time when such lands and tenements became liable to the satisfaction of the judgment; and such deed of conveyance, to be made by the sheriff or other officer, shall recite the execution or executions, or the substance thereof, and the names of the parties, the amount and date of rendition of each judgment, by virtue whereof the said lands and tenements were sold as aforesaid, and shall be executed, acknowledged and recorded as is or may be provided by law, to perfect the conveyance of real estate in other cases.

543. Proceedings in Error Not to Stay Execution Unless Undertaking Executed.

No proceeding to reverse, vacate or modify any judgment or final order rendered in the county, superior or district court, except as provided in the next section, and the fourth subdivision of this section, shall operate to stay execution, unless the clerk of the court in which the record of such judgment or final order shall be, shall take a written undertaking, to be executed on the part of the plaintiff in

error, to the adverse party, with one or more sufficient sureties, as follows:

* * * * *

THIRD. When it directs the sale or delivery of possession of real property, the undertaking shall be in such sum as may be prescribed by the court or the judge thereof, to the effect that during the possession of such property by the plaintiff in error, he will not commit, or suffer to be committed, any waste thereon, and if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the date of the undertaking until the delivery of the possession, pursuant to the judgment, and all costs. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising from the sale, the undertaking must also provide for the payment of such deficiency.

546. UNDERTAKING TO STAY EXECUTION—EXTENSION OF TIME TO MAKE CASE—JUDGMENT IN APPELLATE COURT AGAINST SURETIES.

Before an undertaking shall operate to stay execution of a judgment or order, a petition in error must be filed in the appellate court and the execution of the undertaking and the sufficiency of the sureties must be approved by the court in which the judgment was rendered or order made, or by the judge or clerk thereof; provided, that at any time when the time for making or completing a case-made is extended by the court or judge, the court or judge shall include in such order an order staying execution pending

the giving of an undertaking as herein provided for and the time within which the proceedings in error shall be filed in the Supreme Court, in order to continue such stay of execution pending the completion and settling of the case and the filing of the petition in error in the Supreme Court, and in the event the judgment of the court to which such appeal is taken is against the appellant, judgment shall, at the same time it is entered against the appellant, be entered against the sureties on his said undertaking to stay execution, and execution shall issue thereon against said sureties the same as against their principal, the appellant, and no stay of such execution shall be permitted.

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660945—43

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 269

MILTON ROE SABIN AND BERTHA FLORENCE SABIN, PETITIONERS

v.

HOME OWNERS' LOAN CORPORATION, A CORPORATION; O. K. WETZEL; P. L. MURPHY; A. GARLAND MARRS, SHERIFF OF TULSA COUNTY, OKLAHOMA; W. S. DUGGINS, NATE MARTIN, JOHN BURNETT AND TOM KITHCART, DEPUTY SHERIFFS OF TULSA COUNTY, OKLAHOMA; CAL CRUM, CLERK OF THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA; AND JOE HODGES, DOING BUSINESS UNDER THE NAME AND STYLE OF JOE HODGES TRANSFER AND STORAGE

ON MOTION FOR LEAVE TO PROCEED ON A TYPEWRITTEN RECORD AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE HOME OWNERS' LOAN CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The district court wrote no opinion in this case but its instructions to the jury appear at R. 308–318.

The opinion of the Circuit Court of Appeals (R. 399–406) is reported in 147 F. 2d 653. An opinion of the Oklahoma Supreme Court in an earlier and related phase of this litigation is reported at 187 Okla. 504.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered on February 21, 1945 (R. 407), and a petition for rehearing was denied on March 19, 1945 (R. 435). The time within which a petition for a writ of certiorari might be filed was extended by Mr. Justice Rutledge until July 19, 1945, and, on July 13, 1945, Mr. Justice Black granted a further extension until July 28, 1945. The petition for a writ of certiorari was filed on July 27, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioners may collaterally attack the validity of a deed issued to the Home Owners' Loan Corporation, pursuant to the order of a state court, on the ground that, at the time of the issuance of the deed, execution was stayed.

2. Whether an alias writ of assistance, under which the Home Owners' Loan Corporation was put in possession of property which was the subject of a mortgage foreclosure suit, was void because it issued out of the state trial court while a petition to recall the mandate was pending in the state appellate court.

STATUTES INVOLVED

The pertinent provisions of the Oklahoma statutes are set out in the Appendix, *infra*, pp. 9–12.

STATEMENT

In an action in the District Court of Tulsa County, Oklahoma, the Home Owners' Loan Corporation, on January 10, 1938, secured a judgment on a note made by petitioners and were granted an order of foreclosure on the mortgage securing that note (R. 34, 331–333). A motion for a new trial was overruled on February 9, 1938, and, on August 8, 1938, an appeal was taken from this judgment but no supersedeas bond was filed (R. 35, *Sabin* v. *Home Owners' Loan Corporation*, 187 Okla. 504, 506). In the period that intervened between the judgment and the perfection of the appeal to the Supreme Court of Oklahoma, the district court issued an order of sale (R. 132, 341–342), and the property was purchased, pursuant to this order, by the Home Owners' Loan Corporation. The sale was confirmed, over the petitioners' objection, on September 9, 1938. (R. 35, 349–350.) A sheriff's deed issued on that date and was delivered (R. 351–352). Petitioners, having given notice of their intention to appeal from the order of confirmation, were granted an extension of time within which to make and serve case-made and were also granted twenty days within which to file a supersedeas bond in the amount of $6500 (R. 350). No such bond was filed, but within the twenty days, the Supreme Court of Oklahoma

granted petitioners additional time within which to file a supersedeas bond, and stayed the execution of the order of the district court until further order of the supreme court of the State (R. 136, 375). Petitioners, on February 27, 1939, were granted leave to file, and did file a supersedeas bond in the amount of $2000, and further proceedings under the foreclosure judgment were stayed (R. 132, 344–347). The Supreme Court of Oklahoma affirmed the foreclosure judgment and upheld the order confirming the sale on May 28, 1940. *Sabin* v. *Home Owners' Loan Corporation*, 187 Okla. 504. A petition for rehearing was denied on July 16, 1940 (*Sabin* v. *Home Owners Loan Corporation*, 187 Okla. 504), and a petition for certiorari was denied by this Court. 313 U. S. 570, rehearing denied, 313 U. S. 601. The mandate of the Oklahoma Supreme Court issued to the District Court of Tulsa County on June 13, 1941 (R. 354).

More than a month after the mandate had been issued and had been spread on record in the trial court, an alias writ of assistance was issued (R. 157, 376); by this writ the Sheriff of Tulsa County was ordered to put the H. O. L. C. in possession of the property. On July 24, 1941, leave was granted to the petitioners to file a petition to recall the mandate and to grant a rehearing, and such petition was filed (R. 356–359). This petition was denied (R. 385), and a petition for a writ of certiorari to this Court was also denied. 315 U. S. 800, rehearing denied, 315 U. S. 829. While the petition asking the Supreme Court of Oklahoma to recall its mandate was

pending, the sheriff, acting through his deputies, executed the alias writ of assistance by removing the household furniture, three automobiles, and other personal property, and by placing the purchaser in possession (R. 263, 376).

This suit was instituted on July 24, 1943, in the District Court for Tulsa County, Oklahoma, against the H. O. L. C.; O. K. Wetzel, an attorney who represented the H. O. L. C. in the foreclosure proceedings; P. L. Murphy, an agent of the H. O. L. C.; Cal Crum, the clerk of the state court who issued the order of sale (R. 73), a writ of assistance which was recalled (R. 378), and the alias writ of assistance; the sheriff and the deputies who took part in executing the alias writ of assistance; and the owner of the transfer and storage company that removed the personal property of the petitioners under the direction of the sheriff (R. 2–25). Petitioners alleged that their personal property was removed by the respondents without any legal right, and that respondents were liable for damages in excess of $400,000 (R. 2–24). A petition for removal to the District Court of the United States for the Northern District of Oklahoma (R. 25–27) was sustained (R. 32), and that court, at the close of the petitioners' evidence, dismissed the petition as to Wetzel, Murphy, and Crum (R. 84). At the conclusion of all of the evidence, the court directed a verdict on behalf of the H. O. L. C. (R. 290), and submitted the case of the other respondents to the jury, but with reference to matters not here involved (R. 313).

The jury found for the respondents (R. 81, 82, 319), and after a motion for a new trial (R. 86–88) was overruled (R. 90), judgment was entered against the petitioners (R. 83–85). The Circuit Court of Appeals affirmed (R. 407).

ARGUMENT

1. Petitioners contend that the sheriff's deed to the H. O. L. C. was void because it was delivered at a time when the execution of the order of confirmation had been stayed (Pet. 13–25). Whatever the merits of petitioners' view that execution had been stayed (cf. R. 404–405), it is clear that under the law of Oklahoma, controlling here, the alleged defect in the deed will not support the collateral attack on the H. O. L. C.'s title and right to possession here attempted. *Christy* v. *Springs*, 11 Okla. 710, 717–719. While petitioners gave notice of their intention to appeal the order of confirmation (R. 350), they do not contend that at the time the deed was executed, an appeal had been perfected. Indeed, the record is barren of any showing as to the time when the appeal from the order of confirmation was perfected (cf. R. 404). Consequently, *Johnston* v. *Johnson*, 104 Okla. 131, particularly relied upon by petitioners (Pet. 23–24), is inapplicable, for, in that case, the Oklahoma Supreme Court upheld a collateral attack on the trial court's possessory order because it appeared that when the order was issued an appeal had already been perfected and that the trial court, therefore, no longer had jurisdiction of the

cause. The authorities relied on by the court in the *Johnston* case, *supra* at 133, leave no doubt but that this was the sole ground for the judgment there rendered.

2. Petitioners further assert that the alias writ of assistance, pursuant to which the H. O. L. C. was put into possession, was void because it issued out of the Tulsa County district court while a petition to recall the mandate was pending in the Supreme Court of Oklahoma (Pet. 25–33). But before the alias writ of assistance was issued, the mandate of the Supreme Court had been issued and spread upon the records of the trial court (see *supra*, p. 4) and, under Oklahoma law, it is clear that the trial court had jurisdiction to make any order or enter any judgment in the further progress of the cause not inconsistent with the decision of the Supreme Court. *Harper* v. *Aetna Building & Loan Ass'n*, 88 Okla. 128; *Crews* v. *Bird*, 141 Okla. 143. See also 12 Okla. Stats. Ann. 1941, Sec. 975, Appendix, *infra*, pp. 11-12. The jurisdiction of the trial court is not again divested unless the mandate is recalled (*Brann* v. *Harris*, 173 Okla. 167, 168) and that was not the case here.

Indeed, the Supreme Court of Oklahoma has held that it has no jurisdiction to recall the mandate unless it clearly appears from the record that it was issued through fraud, accident, inadvertence, or mistake. *Thomas* v. *Thomas*, 27 Okla. 784, 801; see *Thompson* v. *Nickle*, 113 Okla. 44. The denial of the petition for rehearing (R. 385) constitutes a ruling of the Oklahoma Supreme Court, then, that

it had no jurisdiction over the cause because the mandate had issued and there was no fraud, accident, inadvertence, or mistake. The state supreme court has "power," of course, to determine its jurisdiction, and that determination is controlling here. Although they are otherwise distinguishable, cases arising in other States or in the federal courts can, for this reason alone, afford petitioners no aid.

CONCLUSION

The judgment of the court below is correct and there is no conflict of decisions. Resolution of the issues in this case turns entirely on Oklahoma law, and there is no warrant for further review.

The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

HAROLD JUDSON,
Acting Solicitor General.

HAROLD LEE,
General Counsel,
RAY E. DOUGHERTY,
Assistant General Counsel,
Home Owners' Loan Corporation.

SEPTEMBER 1945.

APPENDIX

The pertinent provisions of 12 Okla. Stats. Ann. are as follows:

> SEC. 686. In actions to enforce a mortgage, deed of trust, or other lien or charge, a personal judgment or judgments shall be rendered for the amount or amounts due as well to the plaintiff as other parties to the action having liens upon the mortgaged premises by mortgage or otherwise, with interest thereon, and for sale of the property charged and the application of the proceeds; or such application may be reserved for the further order of the court, and the court shall tax the costs, attorney's fees and expenses which may accrue in the action, and apportion the same among the parties according to their respective interests, to be collected on the order of sale or sales issued thereon; when the same mortgage embraces separate tracts of land situated in two or more counties, the sheriff of each county shall make sale of the lands situated in the county of which he is sheriff. No real estate shall be sold for the payment of any money or the performance of any contract or agreement in writing, in security for which it may have been pledged or assigned, except in pursuance of a judgment of a court of competent jurisdiction ordering such sale. The court may, in the order confirming a sale of land under order of sale on foreclosure or upon execution, award or order the issuance of a writ of assistance by the clerk of the court to the sheriff of the county where the land is situated, to place the purchaser in full possession of such land, and any resistance of the

service of such writ of assistance shall constitute an indirect contempt of the process of such court, and if any person who has been removed from any lands by process of law or writ of assistance or who has removed from any lands pursuant to law or adjudication or direction of any court, tribunal or officer, afterwards, without authority of law, returns to settle or reside upon such land, he shall be guilty of an indirect contempt of court, and may be proceeded against and punished for such contempt. * * * (R. L. 1910, Sec. 5128; Laws 1915, ch. 175, Sec. 1, as amended, Laws 1941, p. 35, Sec. 1.)

SEC. 766. The sheriff or other officer who, upon such writ or writs of execution, shall sell the said lands and tenements, or any part thereof, shall make to the purchaser as good and sufficient deed of conveyance of the land sold, as the person or persons against whom such writ or writs of execution were issued could have made of the same, at or any time after they became liable to the judgment. The deed shall be sufficient evidence of the legality of such sale, and the proceedings therein, until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned, as was vested in the party at, or after, the time when such lands and tenements became liable to the satisfaction of the judgment; and such deed of conveyance, to be made by the sheriff or other officer, shall recite the execution or executions, or the substance thereof, and the names of the parties, the amount and date of rendition of each judgment, by virtue whereof the said lands and tenements were sold as aforesaid, and shall be executed, acknowledged and recorded as is or may be provided by law, to perfect the conveyance of real estate in other cases. (R. L. 1910, Sec. 5168.)

SEC. 971. Before an undertaking shall operate to stay execution of a judgment or order, a petition in error must be filed in the appellate court and the execution of the undertaking and the sufficiency of the sureties must be approved by the court in which the judgment was rendered or order made, or by the judge or clerk thereof; provided that at any time when the time for making or contemplating a case-made is extended by the court or judge, the court or judge shall include in such order an order staying execution pending the giving of an undertaking as herein provided for and the time within which the proceedings in error shall be filed in the Supreme Court, in order to continue such stay of execution pending the completion and settling of the case and the filing of the petition in error in the Supreme Court, and in the event that the judgment of the court to which such appeal is taken is against the appellant, judgment shall, at the same time it is entered against the appellant, be entered against the sureties on his said undertaking to stay execution, and execution shall issue thereon against said sureties the same as against their principal, the appellant, and no stay of such execution shall be permitted. (R. L. 1910, Sec. 5254; Laws 1915, ch. 249, Sec. 1.)

SEC. 975. When a judgment or final order shall be reversed on appeal, either in whole or in part, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment. The court reversing such judgment or final order shall not issue execution in causes that are removed before them on error, on which they pronounce judgment as aforesaid, but shall send a special mandate to the court

below as the case may require, to award execution thereupon; and such court, to which such special mandate is sent, shall proceed in such cases in the same manner as if such judgment or final order had been rendered therein. In cases decided by the Supreme Court, when the facts are agreed to by the parties or found by the court below, or a referee, and when it does not appear, by exception or otherwise, that such findings are against the weight of the evidence in the case, the Supreme Court shall send a mandate to the court below directing it to render such judgment in the premises as it should have rendered on the facts agreed to or found in the case. (R. L. 1910, Sec. 5258.)

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In the
Supreme Court of the United States
October Term, 1945

No. 269

MILTON ROE SABIN and BERTHA FLORENCE SABIN,
Petitioners,
VERSUS
HOME OWNERS' LOAN CORPORATION, a Corporation, ET AL.,

PETITION FOR REHEARING

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NOVEMBER, 1945.

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In the
Supreme Court of the United States
October Term, 1945

No. 269

MILTON ROE SABIN and BERTHA FLORENCE SABIN,
Petitioners,

VERSUS

HOME OWNERS' LOAN CORPORATION, a Corporation, ET AL.,

PETITION FOR REHEARING

Come now the above-named petitioners, Milton Roe Sabin and Bertha Florence Sabin, and present this their petition for a rehearing of the petition for *certiorari* in this case.

I.
Jurisdiction

The petition for *certiorari* was filed July 17, 1945, and was denied on October 22, 1945. This petition is filed within less than twenty-five days thereafter, under Rule 33 (28 U. S. C. A. No. 354).

II.

Reasons for Petition for Rehearing

The Sheriff's Deed herein, the only muniment of title as the basis for the alias writ of assistance under which petitioners were dispossessed of their home, was issued the same day the order confirming sale was made, although the latter order allowed petitioners twenty days to supersede. This the Circuit Court of Appeals and counsel for respondent, H. O. L. C., in their brief, recognize.

However, counsel for respondents argued in their brief filed in this Court (Page 6) that the record does not show when an appeal was perfected, and for that reason seek to distinguish *Johnston* v. *Johnson*, 104 Okla. 131, 230 Pac. 700. The Circuit Court of Appeals in its opinion, 147 Fed. (2d) 653, likewise attached some importance to the matter of appeal, saying, "We understand that no appeal from the order was *ever* perfected." This, admittedly, is an incorrect conclusion as to the facts, because the decision of the Supreme Court of Oklahoma, 187 Okla. 504, 105 Pac. (2d) 245, affirmatively shows that there *was* an appeal from that order.

Whether an appeal was perfected, or the time it was perfected, is not important. It would have been unusual if an appeal could have been perfected the same day the order was made.

The important point is that execution of the order was stayed for twenty days by the order itself, yet the deed was issued during that twenty days, i. e., on the same day. The

opinion of the Circuit Court of Appeals, and the brief of respondents in this Court, entirely overlooks this point.

A correct ruling, in accordance with the decisions, on that question of general and local law, must have resulted in a different disposition of the case.

III.

The Controlling Question

The controlling question, therefore, is: Whether a sheriff's deed is void when issued while execution was stayed?

IV.

Conflict of Decisions

On that question the affirmative holding of the Circuit Court of Appeals, wherein it says:

> "The contention that the deed is presently void because at the time of its execution and delivery an order was in force and effect staying execution of the judgment, is without merit,"

is in direct conflict with the applicable decisions of the Supreme Court of Oklahoma. No decision is cited to support this statement, wherefore it appears to have been based solely upon a misapprehension of the facts by that court.

Counsel for respondents in their brief filed in this Court say (Page 6) that *Johnston* v. *Johnson, supra,* is inapplicable because in that case an appeal had been perfected and that was the sole ground for the judgment. That is an improper interpretation of that case, as well as of the authorities therein cited.

In that case it was the interference with possession at a time when execution was stayed that was held to be without

authority of law. It is the *supersedeas*—the setting aside—that is important, whether that be by reason of an appeal perfected, by a writ issued for the purpose, by the provisions of the order, or the provisions of the statute.

Under the provisions of Section 546, Oklahoma Statutes 1931, then in effect, the stay "pending the giving of an undertaking" is as much a *supersedeas* setting aside the power of the sheriff to act and commanding him to desist from enforcement of the execution by issuing a sheriff's deed, as it is the stay which becomes operative by reason of the undertaking given later, and is as much a *supersedeas* as the stay of execution which is *continued* in effect after the actual filing of the appeal.

V.

Prayer

For the foregoing reasons, petitioners respectfully urge that a rehearing be granted; that upon further consideration the order of October 22, 1945, denying the petition for *certiorari* be revoked; and that the writ of *certiorari* issue.

HERBERT K. HYDE,
Oklahoma City, Oklahoma,
Attorney for Petitioners.

LEE WILLIAMS, *of Counsel.*
NOVEMBER, 1945.

CERTIFICATE:

I, Herbert K. Hyde, attorney for the above-named petitioners, Milton Roe Sabin and Bertha Florence Sabin, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

HERBERT K. HYDE,
Attorney for Petitioners.

NOVEMBER, 1945.